Office-Supreme Court, U.S.
FILED
AUG 18 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1150

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1983

---

HOWARD ELLIS, ET AL.,
*Petitioners,*

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, ET AL.,
*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

## BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING REVERSAL

---

DAVID CRUMP
Professor of Law
South Texas College of Law
and President
The Legal Foundation of America
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Attorney for Amicus Curiae

TABLE OF CONTENTS


TABLE OF AUTHORITIES ii

BRIEF OF AMICUS CURIAE 1

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

PRELIMINARY STATEMENT 2

I. COMPULSORY SPEECH OR ASSOCIATION MUST BE "NARROWLY TARGETED" TO ADVANCE A "COMPELLING" GOVERNMENTAL INTEREST. ALTHOUGH COLLECTIVE BARGAINING ACTIVITIES ARGUABLY MEET THIS TEST, OTHER KINDS OF FORCIBLY FUNDED SPEECH AT ISSUE HERE DO NOT. 3

A. Strict scrutiny is required. 3

B. While the use of compulsory dues to support collective bargaining, contract administration, and grievance processing arguably meets the constitutional test, other kinds of forced expression at issue here do not. 7

II. UNLESS ACCOUNTING DUTIES ARE ENFORCED, NO LIMITATION ON UNION USE OF FUNDS FOR IDEOLOGICAL OR POLITICAL PURPOSES WILL BE MEANINGFUL. 12

CONCLUSION 14

## TABLE OF AUTHORITIES

### CASES


Abood v. Board of Education, 431 U. S. 209 (1977) 5
Arrow v. Dow, 544 F. Supp. 458 (D. N. M. 1982) 6
Beck v. Communications Workers of America, 1983 Daily Labor Rept. No. 48 at D-1 (D. Md. Mar. 4, 1983) 7, 14
Board of Education v. Barnette, 319 U. S. 624, 642 (1943) 3
Brown v. Socialist Workers '74 Campaign Committee, 51 U. S. L. W. 4015 (U. S. S. Ct. 1982) 3
Buckley v. Valeo, 424 U. S. 1, 65 (1976) 4
Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 685 F.2d 1065, 1072 (9th Cir. 1982) 6, 11
Elrod v. Burns, 427 U. S. 347, 362-63 (1976) 4
Falk v. State Bar, 411 Mich. 63 (1981) 6
Galda v. Bloustein, 686 F.2d 159 (3rd Cir. 1982) 6
Good v. Associated Students, 86 Wash. 2d 94, 542 P.2d 762, 766 (1977) 3, 6
In re Primus, ____ U. S. ____ (1978) 9
International Ass'n of Machinists v. Street, 367 U. S. 740 (1961) 5, 7, 8, 14
Kusper v. Pontikes, 414 U. S. 51, 58 (1973) 4
NAACP v. Alabama, 357 U. S. 449 (1958) 3
NAACP v. Clairborne Hardware Co., 102 S. Ct. 3409, n. 80 (1982) 3
NLRB v. Jones & Laughlin Steel Co., 301 U. S. 1 (1937) 8
Railway Employees' Dep't v. Hanson, 351 U. S. 225 (1956) 5, 11, 14
Regents v. Bakke, 438 U. S. 265 (1978) 4
Robinson v. New Jersey, 547 F. Supp. 1297 (D. N. J. 1982) 7, 14
Wooley v. Maynard, 430 U. S. 705 (1977) 3


### STATUTES


National Labor Relations Act 8

Railway Labor Act 2, 7, 8, 10

SECONDARY AUTHORITIES

J. Dukeminier & S. Johanson, Family Wealth Transactions ch. 14 (2d ed. 1978) 12
Merrill, Limitations on the Use of Compulsory Union Dues, 42 J. AIR L. & COMM. 711, 716 (1976) 11
Study of Professor Ronald K. Teeples, CR276 at 37 et seq. 11

NO. 82-1150

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

HOWARD ELLIS, ET AL.,
PETITIONERS
V.
BROTHERHOOD OF RAILWAY, AIRLINE
AND STEAMSHIP CLERKS, ET AL.,
RESPONDENTS

# BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING REVERSAL

## INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in Internal Revenue regulations. It is located on the campus of the South Texas College of Law in Houston and shares personnel and activities with the law school.*

LFA's goals include preservation of the market system of resource allocation, attainment of a better balance between the federal government and the States, furtherance of individual political freedom, and preservation of a rational system of criminal justice. In pursuit of its aim to enhance the function of the market system, LFA has frequently appeared as amicus curiae in

---

* Amicus curiae wishes to acknowledge, with thanks, the assistance of law student Susan Laurea in the preparation of this brief.

cases involving labor issues both in this honorable Supreme Court and in lower courts. It has also frequently appeared in cases involving the freedoms of speech and association. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

## SUMMARY OF ARGUMENT

Respondents maintain that the challenged union expenditures are constitutional because they are "germane to" collective bargaining. Amicus curiae submits, however, that the "germane to" test used below to determine the constitutional validity of such expenditures is not the appropriate standard. Instead, when fundamental rights are infringed, strict scrutiny is necessary. Such analysis requires that a "compelling" interest of government be shown to be actually furthered by the government policy. Furthermore, the interference must be shown to be "narrowly targeted" to achieve the governmental interest in question.

Under this analysis, collective bargaining, contract administration, and grievance processing are arguably constitutional uses of compulsory union fees, because they are narrowly targeted to advance the compelling interest in unobstructed commerce, which is the overarching goal of national labor legislation. The union shop as authorized by sec. 2, Eleventh of the Railway Labor Act is thus not a "compelling" end in itself; it is merely a means of funding these essential functions without "free riders." But forcing dissenting workers to support controversial ideas through diffuse "public interest" litigation, magazines, or social functions, on the theory that such dissenters would otherwise get a "free ride" on expression with which they disagree in the first place, is not narrowly targeted to support any compelling interest.

## PRELIMINARY STATEMENT

Amicus curiae agrees with petitioners that the Railway Labor Act itself prohibits the expenditures in question. Amicus here deals only with the constitutional issues in order to avoid

duplication of petitioners' arguments. Amicus stresses, however, that it may not be necessary to reach this analysis, since it is submitted that the statute should be interpreted to reach the same result.

## I. COMPULSORY SPEECH OR ASSOCIATION MUST BE "NARROWLY TARGETED" TO ADVANCE A "COMPELLING" GOVERNMENTAL INTEREST. ALTHOUGH COLLECTIVE BARGAINING ACTIVITIES ARGUABLY MEET THIS TEST, OTHER KINDS OF FORCIBLY FUNDED SPEECH AT ISSUE HERE DO NOT.

### A. *Strict Scrutiny is Required.*

This case involves the right of association and the right to refrain from supporting speech with which one disagrees. These are fundamental rights.[1] A mass of cases decided by this Court

---

1 In NAACP v. Clairborne Hardware Co., 102 S. Ct. 3409, n. 80 (1982), this Court quoted de Tocqueville in designating the right of association "one of the most natural privileges of man." See also NAACP v. Alabama, 357 U. S. 449 (1958); Brown v. Socialist Workers '74 Campaign Committee, 51 U.S.L.W. 4015 (U. S. S. Ct. 1982). Furthermore, the "[f]reedom to associate carries with it a corresponding right to not associate." Good v. Washington, 86 Wash. 2d 94, 542 P. 2d 762, 766 (1975). With respect to the right not to speak (or to refrain from supporting speech with which one disagrees), Board of Education v. Barnette, 319 U. S. 624, 642 (1943), holds as follows:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." Id. at 642.

See also Wooley v. Maynard, 430 U. S. 705 (1977).

Recently, the right to refrain from associating has been extended to such contexts as political patronage schemes, mandatory student service fees, and compulsory state bar dues used to subsidize controversial expression. See notes 2, 8-9 infra and accompanying text.

requires that any infringement of these rights be supported by a "compelling" governmental interest.[2]

Furthermore, the infringement must be "narrowly targeted" to advance the compelling interest in question.[3] Mere "relationship" to a governmental objective is not enough.[4] The compul-

---

2 " '. . . this type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arise, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . . '. Buckley v. Valeo, 424 U. S. 1, 65 (1976). Thus, encroachment 'cannot be justified upon a mere showing of a legitimate state interest but must be justified upon an interest that is shown to be paramount and one that is of vital importance to the state.' Kusper v. Pontikes, 414 U. S. 51, 58 (1973). Furthermore, the burden is on the government to show the existence of such an interest and 'the government must employ means closely drawn to avoid unnecessary abridgment.' Buckley v. Valeo, 424 U. S. 1, 94 (1976)."

Elrod v. Burns, 427 U. S. 347, 362-63 (1976). In Elrod, this honorable Supreme Court struck down a patronage system in which employment was conditioned upon political party membership.

3 This requirement has been stated in several equivalent formulations, requiring means "closely drawn," or "tailored," or "necessary," or "least restrictive," to achieve the compelling interest. See note 2 supra and authorities therein cited; see also authorities cited in note 1 supra and notes 8-9 infra.

Perhaps the best illustration of this "narrow targeting" requirement is to be found in Regents v. Bakke, 438 U. S. 265 (1978), which, although it deals with racial classifications rather than with expression, involves the same principle. School admissions providing diversity in the student body could be said to involve a "compelling" interest, but the "quota" plan was too broad; the Harvard plan, in which racial diversity could be considered as one factor, was validated as more closely drawn to serve the compelling interest at issue.

4 "[E]ncroachment [on fundamental rights] 'cannot be justified upon a mere showing of a legitimate state interest.' " Elrod v. Burns, 427 U. S. 347, 362-63 (1976), citing Kusper v. Pontikes, 414 U. S. 51, 58 (1973).

sion must be tailored to, or "narrowly targeted" to meet, the compelling interest that is its objective, if it is to infringe fundamental rights and still be constitutional.

While this honorable Court has not found it necessary to consider this "narrowly targeted compelling interest" test in prior labor decisions such as Abood, Street, and Hanson,[5] the issue is squarely raised here. The respondent union maintains that any expression "related to" its union functions, or benefitting it or enlarging its power, can overcome dissenters' speech or associational interests and justify compulsory financial support.[6] The Ninth Circuit held that anything "germane to the

---

5 Abood v. Board of Education, 431 U. S. 209 (1977); International Ass'n of Machinists v. Street, 367 U. S. 740 (1961); Railway Employees' Dep't v. Hanson, 351 U. S. 225 (1956).

The Court was able to resolve each of those cases without directly deciding whether strict scrutiny was appropriate in the context at bar. The present case is the first in which the issue has been unavoidably presented.

In Abood, Mr. Justice Powell wrote separately to point out that the constitutional issue, if confronted, would require strict scrutiny:

> Under First Amendment principles that have become settled since Hanson and Street were decided, it is clear that . . . the [proponent] should bear the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve paramount governmental interests . . . .
>
> I would adhere to established First Amendment principles and require the state to come forward and demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled [payment] is necessary to serve overriding governmental objectives. This placement of the burden of litigation, not the Courts', gives appropriate protection to First Amendment rights without sacrificing ends of government that may be deemed important.

Abood v. Board of Education, supra, 431 U. S. at 255, 263-64 (separate opinion of Mr. Justice Powell).

6 Thus respondent has, throughout this litigation, supported such "Paragraph 22" expenditures as magazines, conclaves and "public

union's work in the realm of collective bargaining" could overcome these fundamental rights.[7] Such diffuse reasoning is inconsistent with the requirement of "narrow targeting" to advance a "compelling" interest, the test this Court has consistently applied to infringements of speech or association.

In other kinds of membership cases, such as those involving dues for integrated bar associations, compulsory student fees at universities, and like exactions, the courts have applied the strict scrutiny approach to the use of monies for controversial expression. For example, in Falk v. State Bar,[8] a plurality of the Michigan Supreme Court limited the use of bar dues supporting controversial expression to the least restrictive means necessary to serve compelling governmental interests. The New Mexico federal district court reached a similar result in Arrow v. Dow.[9] In Galda v. Bloustein,[10] the Third Circuit used strict-scrutiny analysis to invalidate use of compulsory student fees to fund a "public interest" corporation engaged in litigation and public education activities very similar to some at issue here.

---

interest" litigation on the theory that these expenditures are "rationally related" to one of the "central purposes of national unions," namely, "to enhance . . . the strength" of all unions by "maximum organization of the industry." See CR 155 at 176.

7 Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 685 F.2d 1065, 1072 (9th Cir. 1982).

8 411 Mich. 63 (1981).

9 544 F. Supp. 458 (D. N. M. 1982). The New Mexico Bar Association had used dissenting members' dues to fund controversial lobbying including stands against continuing education requirements for lawyers, in favor of Mental Health Code amendments, and in favor of millions of dollars of additional funding for prosecution and defense offices. The district court used the compelling interest test to strike down these expenditures.

10 686 F. 2d 159 (3rd Cir. 1982). Cf. Good v. Associated Students, 86 Wash. 2d 94, 542 P. 2d 762, 766 (1977).

And in Robinson v. New Jersey,[11] the Court struck down lobbying and other expenses by a union, using first amendment analysis.

*B. While the use of compulsory dues to support collective bargaining, contract administration, and grievance processing arguably meets the constitutional test, other kinds of forced expression at issue here do not.*

The purpose of the union shop or agency shop (as this Court recognized in Street, supra), is to avoid "free riders."[12] Federal labor legislation requires a union, when it serves as exclusive bargaining agent, to act "fairly and equitably to represent all employees."[13] Individuals are prevented from bargaining for themselves as to matters bargained collectively, when the union is exclusive agent. Thus the theory behind Railway Labor Act sec. 2, Eleventh, which is the authority for the union shop, is to reimburse the union for collective bargaining, contract administration, and grievance processing, because federal law imposes these duties upon it and because the theory is that it performs these functions for *all* employees.[14]

---

11 547 F. Supp. 1297 (D. N. J. 1982); Accord, Beck v. Communications Workers of America, 1983 Daily Labor Rept. No. 48 at D-1 (D. Md. Mar. 4, 1983) (applying strict scrutiny).

12 The principal argument made by the unions in [urging adoption of sec. 2, Eleventh] was based on their role in this regulatory framework. They maintained that because of the expense of performing their duties in the congressional scheme, fairness justified the spreading of the cost to all employees . . . . They thus advanced as their purpose the elimination of the "free riders" . . . .
International Ass'n of Machinists v. Street, 367 U. S. 740, 761-62 (1977); accord, id. at 764 n. 15.

13 Id. at 760-61.

14 Id. See also Id. at 751, 755.

In turn, collective bargaining is an instrument of national labor policy.[15] It is narrowly targeted to serve the arguably compelling interest in maintaining the free flow of interstate commerce. This goal of unobstructed commerce is the overarching purpose of the national labor legislation.[16] The union shop or agency shop is merely a means of funding the collective bargaining process in order to serve this goal.[17] The union shop is not an end in itself.[18]

Other kinds of forced speech argued for by the union, however, do not meet the test. This union used forced dues from dissenters to engage in diffuse kinds of "public interest" litigation, for example. It attempted to change existing law to make unions more powerful. This litigation, however sincerely union presidents may have supported it, was controversial and ideologi-

---

15 Id. at 760: "In prescribing collective bargaining [and] in conferring on unions the status of exclusive representatives . . . , Congress has . . . [effectuated] the basic congressional policy of stabilizing labor relations in the industry.

16 The purpose clause of the NLRA declares that "it is the policy of the United States to eliminate [the] causes of obstruction of the free flow of commerce," as paraphrased by this honorable Supreme Court. NLRB v. Jones & Laughlin Steel Co., 301 U. S. 1 (1937). This policy under the Railway Labor Act is even more compelling because of the urgent need to keep trains and airplanes operating.

17 It is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the "free rider." . . . [W]e construe sec. 2, Eleventh as not vesting the unions with unlimited power to spend exacted money. Street, supra, 367 U. S. at 767-68.

18 Some States do not even allow the union shop (the federal legislation empowers States to decide the issue), and indeed the original Railway Labor Act, enacted in 1934, did not provide for it. Section 2, Eleventh, authorizing the agency shop as a means of funding collective bargaining, was not enacted until 1951.

cal.[19] Dissenters' associational and speech interests are at their strongest when they are forced to support such ideological causes.[20] Furthermore, forced support of such diffuse "public interest" litigaton is simply not "narrowly targeted" to advance the free flow of interstate commerce, nor is it tailored to meet any other "compelling" governmental interest. The mere fact that this forced association may somehow be "related" to or "germane" to the union's own idea of its function should not suffice to overcome the fundamental rights the union thus

---

19 The union sued to enjoin airlines' use of a "Mutual Aid Pact" or "strike fund," for example. 685 F.2d at 1073. This litigation was directly opposed to the congressional goal of unobstructed commerce (because it made strikes more likely). Thus the litigation not only was not "closely drawn" to a compelling interest; it was actually harmful to the compelling interest Congress specifically identified as the basis of the national labor legislation. And even if it did have the claimed effect of "strengthening the union's ultimate . . . weapon," Id., this litigation was ideological, political, and controversial in character.

The union also used dissenters' money for litigation to allow it to defend alleged acts of race and sex discrimination in violation of the Civil Rights Act of 1964. Id. Dissenters should not have had to support such litigation.

20 Collective bargaining or grievance processing are, themselves, essentially economic in nature. Arguably, the expression involved in contract negotiations thus has a less "pure" speech aspect to it.

But diffuse "public interest litigation" of the sort engaged in by the union here is strikingly different; it is hard-core ideological expression. Cf. In re Primus, ____ U. S. ____ (1978) (public interest litigation held protected means of speech under first amendment; ACLU lawyer not subject to bar association's antisolicitation rules, and could permissibly solicit clients, because of importance of litigation as a means of political expression).

infringes.[21]

Similarly, the forced use of dissenters' dues to publish magazines on a wide variety of subjects, to hold social functions, or to hold conventions not confined to collective bargaining,[22] is not narrowly targeted to advance compelling interests in unobstructed commerce.

It is important to realize that a compelling interest cannot be found in the broad "union benefit" or "free ride" rationale

---

21 "Germane to the union's work in the realm of collective bargaining" is an exceedingly loose term. The "germane to the realm of" approach would presumably approve even actions destructive of collective bargaining. An action need not be "supportive of" collective bargaining to be "germane to" its "realm": actions "threatening," or "removing," or "weakening" collective bargaining are all, by definition, "germane" to its "realm."

This very brief of this Amicus Curiae, for example, is "germane to the realm of" collective bargaining in the same sense. Should those who disagree with this Amicus Curiae be forced to support it, an analogous case to the present controversy would be presented. Leaders of the respondent union may not wish to support this Amicus in this endeavor, and they should not be forced to do so.

22 It is difficult to see how forcing dissenters to fund union social parties is "closely drawn" to promote the "compelling" interest in unobstructed commerce. Dissenters may particularly object to their compelled funding of publications and magazines containing rhetoric, expressed in sometimes harsh and extreme terms, supporting political and ideological goals chosen by the unions, with which these dissenters vigorously disagree. Again, that forced funding is not "closely drawn" to support any compelling interest.

Nor is the union organization of other firms part of the process of collective bargaining that sec. 2, Eleventh was to fund; it is not "closely drawn" to prevent obstruction of commerce. The Court of Appeals said that "[m]aximum organization" had the effect of "eliminating competition" from non-union employers and thus "strengthening" the union. The Court of Appeals seems to have concluded that the purpose of labor legislation was to create the strongest possible union. But unions, in and of themselves, are not a "compelling" interest. They are merely an instrument of industrial policy, allowed to exist so that commerce will remain unobstructed.

asserted by respondents here.[23] Under this notion, anything that might increase the power or authority of unions could justify infringement of speech or association, on the theory that dissenters were somehow benefited by greater union power, albeit against their will. In the first place, evidence in this record shows that the claimed "union benefit" is completely absent. Union shop employees actually earn less, in this industry, than their open shop counterparts.[24] As this honorable Supreme Court said in Hanson, supra, 351 U. S. at 233-34, "powerful arguments" can be made that "long run interests of labor would be better served . . . without the coercive element of the union or the closed shop." The present case forcefully demonstrates the correctness of that observation, because the "union benefit," here, is in actuality a negative quantity.[25]

---

23 "BRAC responds that . . . all employees under a union shop or agency fee arrangement should be required to shoulder their fair share of these traditional union activities." Ellis, supra, 685 F. 2d at 1068.

24 Study of Professor Ronald K. Teeples, CR 276 at 37 et seq. Professor Teeples examined eleven domestic trunk airlines during the period 1952 to 1976. He found non-union pay rates higher, across the industry, than union rates. Furthermore, he found this non-union superiority to hold in nearly every job category: "The non-union averages are in nearly every instance higher than the corresponding union averages." Id. He also found that the rate of increases in pay was better for non-union workers: "Again, below average . . . payrate progressions are related to union status." Id. The Teeples study included supplemental benefits as well as such factors as holidays and sick leave. These factors did not change the result, because "lower payrates [i.e., union contracts] tend to have lower supplementary provisions." Id.

In short, there is no "union benefit" here. It was not beneficial to a worker to be in a union shop; it was actually harmful.

25 It can be persuasively argued that superior workers are disadvantaged by the union shop since union efforts to enhance the status of marginal employees must of necessity come at the expense of superior workers' compensation. See Merrill, Limitations on the Use of Compulsory Union Dues, 42 J. AIR L. & COMM. 711, 716 (1976).

But more importantly, while there may be a compelling interest supporting exclusivity of collective bargaining (because it furthers unobstructed commerce), there is no such narrowly targeted, compelling interest that can be asserted to support the diffuse "union benefit" theory. Forcing dissenters to accept putative "benefits" they prefer to reject is not "narrowly targeted" to promote the free flow of commerce. It is not essential to the collective bargaining scheme that Congress set up to achieve this objective.[26] And the imposition of compulsory dues to prevent dissenters from somehow obtaining a "free ride" on [27] diffuse public interest litigation, union magazines, social gatherings and other speech, with which they vehemently disagree in the first place and therefore do not want a "free ride" upon, cannot be said to be narrowly targeted to serve any compelling interest at all.

## II. UNLESS ACCOUNTING DUTIES ARE ENFORCED, NO LIMITATION ON UNION USE OF FUNDS FOR IDEOLOGICAL OR POLITICAL PURPOSES WILL BE MEANINGFUL.

The common law has placed a strict duty of accounting upon representatives holding funds for other persons. Thus executors, trustees, attorneys, and fiduciaries, among others, are under obligations of accounting, usually by rigorously prescribed methods. They are limited to certain kinds of usages and are prohibited from self dealing, even in the absence of constitutional issues.[28]

---

26 See notes 11-15, supra.

In fact, this sort of coercion is likely to engender hostility in splinter groups that may lead to precisely the kind of obstructions of commerce Congress sought to avoid.

27 See notes 19-20 supra and accompanying text.

28 The union has admitted that it owes plaintiffs "a fiduciary obligation." CR 80 at 31. This obligation includes the duty to account. See, e.g., J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH

It would be ironic if such accounting obligations, which are routinely imposed by the courts at common law, were not required to protect the exercise of the first amendment freedoms at issue here. In fact, any protection of these rights would be illusory without a requirement of accounting, since only the union and its officials could possibly know how it expends the funds of dissenters.

The evidence, here, makes crystal clear the union's commingling of funds for permitted uses with those for restricted uses. Union officials with financial responsibility have testified to the union's inability to separate the categories of expenditures at issue.[29] The union maintains that it can "document" all expenditures in the sense of being able to tell that a given expenditure was made, but the uselessness of this "documentation" becomes apparent when one realizes that it cannot tell what category any expenditure falls into.[30] And no one else can trace

---

TRANSACTIONS ch. 14 (2d ed. 1978). A fiduciary has the duty to earmark the beneficiary's property, to avoid commingling, and to preserve and prudently invest the beneficiary's property. Id. The common law has deemed these protections necessary to protect the beneficiary adequately.

29 There is absolutely nobody at the present time that knows where the money has been spent or for what reasons. It is an impossibility under our present system, to know this.
Report of International Union's Secretary-Treasurer, Exhibit 1178, at 36, admitted at RT, Aug. 11, 1978, at 1251. The accounts were called the "standard joke" of the organization. Id. The union's accountants, Haskins and Sells, testified through one of its partners that union records would not permit an accurate calculation of amounts spent for political purposes. Deposition of Russell Wende at 43-44, 48, admitted at RT, Aug. 10, 1978, at 1236-37, 1239.

30 The defendants maintain only that "there are records for every union disbursement," although admitting that the records "are not maintained along [relevant] categories," making them useless for the purpose. Appellee's Brief in Court of Appeals at 46. In short, all that the union can tell is that it has spent the amount of plaintiffs' money reflected by its expenditure records.

the funds, for it is the union that has exacted and expended them.

Even the basic holdings in Street and Hanson cannot be enforced without an obligation to account. The Court of Appeals' acceptance of bare testimony by union officials, which the union admits is unsupported by accounting using any accepted method, should be reversed. Courts other than this Court of Appeals, hearing similar cases, have recognized the significance of the accounting issue and have given it great attention.[31]

## CONCLUSION

The kinds of coercion of expression and association at issue here are not "narrowly targeted" to serve the "compelling" interest in free flow of commerce that Congress identified as the goal of national labor legislation. And since fundamental rights of expression and association are infringed, this strict scrutiny approach is the applicable test. The decision of the Court of Appeals should be reversed.

Respectfully submitted,

David Crump
Professor of Law
South Texas College of Law
and President
The Legal Foundation of America
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040

31 E.g., Beck v. Communications Workers of America, 1980 Daily Labor Rept. (BNA) No. 166 at D-1 (Aug. 18, 1980) (special master's report), adopted with modifications, 1983 Daily Labor Rept. No. 48 at D-1 (D. Md. Mar. 4, 1983). Robinson v. New Jersey, supra note 11.